

65774-7

65774-7

NO. 65774-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DAVEN NYSTA,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE RICHARD McDERMOTT

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Did the trial court correctly rule that the defendant's custodial statements were admissible at trial?

2. Well after the defendant's trial was complete, jury questionnaires used during *voir dire* were filed with the clerk's office under seal. Has the defendant shown that this action entitles him to reversal of his conviction and a new trial?

3. The State concedes that two of the defendant's convictions, count II, rape in the second degree, and count III, felony harassment, violate principles of double jeopardy and therefore his felony harassment conviction must be vacated.

4. The defendant's claim that his trial counsel was ineffective for failing to argue that count II and count III constitute the "same criminal conduct" for scoring purposes is moot because the State concedes those two convictions violate double jeopardy.

5. In State v. Bashaw,<sup>1</sup> the Supreme Court held that it was error to instruct the jury that it must be unanimous in order to find the State failed to prove an aggravating factor. Should this Court

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<sup>1</sup> 169 Wn.2d 133, 234 P.3d 195 (2010).

reject the defendant's Bashaw claim because the jury was not instructed in that manner in this case and because another aggravating factor--not subject to a Bashaw challenge--supports the defendant's exceptional sentence?

6. As to count II, the Judgment and Sentence mistakenly lists the conviction as rape of a child in the second degree when it should read rape in the second degree. The State agrees that this Court should remand for correction of this scrivener's error.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged as follows:

Count I:	First-Degree Rape
Count II:	Second-Degree Rape
Count III:	Felony Harassment
Count IV:	Misdemeanor Violation of a Court Order
Count V:	Misdemeanor Violation of a Court Order
Count VI:	Tampering with a Witness.

CP 117-20. Count II contained an aggravating factor that the offense was a domestic violence offense committed within the sight or sound of the victim's minor child (hereinafter, the "domestic violence aggravator"). CP 118. A jury convicted the defendant as charged. CP 164, 166-71.

Along with his six current convictions, the defendant has a criminal history that includes 21 prior convictions--10 prior felony convictions and 11 prior misdemeanor convictions. CP 311, 317. His offender score on counts I and II--his rape convictions and crimes with the highest seriousness level--was 14. CP 304. His offender score on the other two felony convictions was 12. CP 304. The highest offender score on the SRA sentencing grid is nine. See RCW 9.94A.510.

At sentencing, the court described the defendant's criminal history as containing "violent crimes, horrible crimes," enough for three or four people, and that when he drank, the defendant turned into a "monster," "one of the worst criminals I've ever seen." 10RP 19-20. The court imposed a standard range minimum term sentence of 240 months on count I, and 210 months on count II. CP 307. The court imposed an exceptional sentence by running count I consecutive to count II. CP 307. The defendant received lesser sentences on all the remaining counts to be served concurrently to counts I and II. CP 306-07, 320-22.

## 2. SUBSTANTIVE FACTS

At the time of the charged incidents, SF was a lonely 34-year-old woman going through a divorce and caring for her two young children, eight-year-old DF, and two-year-old LF. 7RP<sup>2</sup> 6-7, 14. The defendant is a cousin of SF's ex-husband. 7RP 9. SF had known the defendant for approximately ten years, and would run into him every year or so at family functions when he was not in jail. 7RP 10-11.

In February of 2009, the defendant had been released from jail and "out of the blue," he called SF and said he wanted to come over and see her. 7RP 11. He told SF that he always dreamed about her and that he wanted to be with her. 7RP 12. SF was not keen on the idea but told the defendant he could come over to her house and hang out if he wanted. 7RP 13.

When the defendant arrived, he shocked SF by giving her a very romantic kiss. 7RP 15. SF described that the defendant was exceedingly nice to her, that she was very lonely, and that he ended up staying the weekend. 7RP 15. Over the next few weeks,

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<sup>2</sup> The verbatim report of proceedings is cited as follows: 1RP--5/3/10; 2RP--5/4/10; 3RP--5/5/10; 4RP--5/6/10; 5RP--6/7/10; 6RP--6/8/10; 7RP--6/9/10; 8RP--6/10/10 & 6/14/10; 9RP--6/15/10, and 10RP--7/23/10.

the defendant made SF feel like a teenager again and she fell madly in love with him. 7RP 16. However, things changed quickly.

The defendant, who was unemployed, began drinking again and using drugs. 7RP 19. When he did so, his anger would flare and he would become physically abusive, biting and assaulting SF. 7RP 20-22. Additionally, over the five months they were together, the defendant would make SF give him money, he would make her buy him things--including two Cadillacs, and on occasion he would steal money from her. 7RP 23-26, 33, 35-36. During this time he obtained three guns and stored them in SF's house--a sawed-off modified 20-gauge shotgun, a 15-roundbullet semiautomatic handgun, and a revolver. 7RP 26-27.

During their brief relationship, the defendant threatened to beat SF if she ever cheated on him. 7RP 28. He told her that back on Guam, he had once shot someone. 7RP 29. Despite all this, SF stayed with the defendant because he would talk with her, make her smile, and show her off to his friends. 7RP 31-32. She "fell deeply in love with him." 7RP 31.

On July 31, 2009, SF was at work when the defendant called and asked her for some money. 7RP 32. He also wanted her to buy him some 20-gauge shotgun shells. 7RP 32. SF told the

defendant no and said that he sounded like he was drunk. 7RP 32. The defendant denied it. 7RP 32. The defendant was with his friends and said that he was going to go fight someone--a thing of honor and respect. 7RP 34.

Later that evening, SF got a call from the defendant saying he was coming by her house with a friend of his. 7RP 36. An hour later, he showed up with two of his "homies," and a man named Fletcher Leon. They explained that there had been a fight earlier in the evening. 7RP 37. SF told the defendant that she had had enough, she wanted to break up. 7RP 39. The defendant got angry, said it was over between them, and drove away. 7RP 39.

At about 6:00 a.m., the next morning there was a knock at the door. 7RP 41. When SF opened the door, the defendant, who was highly intoxicated, pushed his way inside. 7RP 41. SF told the defendant things could not continue as they had, and that she had gone out with another man. 7RP 42. When the two went upstairs to pack some of the defendant's things, the defendant grabbed SF from behind, pulled her underwear off (she was wearing only underwear and a nightgown), threw her on the bed and digitally raped her. 7RP 45. Crying, SF told the defendant to stop but he simply ordered her to shut up. 7RP 45.

After a few minutes, the defendant demanded that SF sit on the floor whereupon he proceeded to kick her in the face with his shoes on. 7RP 46. Police later documented the visible bruising in the form of shoe prints on various parts of SF's body. 6RP 35-37, 40-41. The defendant then started beating SF about the head and shoulders and made her take off her nightgown. 7RP 47. He asked SF who she had been with but every time SF answered one of his questions, the defendant would hit her in the face. 7RP 47. Police later documented the severe bruising of SF's face--her eyes were almost completely swollen shut. 7RP 55. After digitally raping SF again and while beating her again, SF heard her daughter, LF, crying. 7RP 48.

Responding to SF's pleadings, the defendant allowed SF to go to her daughter and change her--all the while holding her by the hair and occasionally hitting her. 7RP 49. The defendant then took LF in his arms, made SF kneel on the floor, and urinated on her. 5RP 49.

After making SF shower, the defendant told her that it was now time for him to "fuck" her. 7RP 50. He then proceeded to do so--anally and vaginally--with LF huddled very quietly against the wall. 7RP 50. He also threatened to kill SF and both of her

children. 7RP 52. Not being able to maintain an erection because of his intoxication, the defendant forced SF to perform oral sex on him. 7RP 50. While this was going on, the defendant passed out. 7RP 51.

SF then fled the home with LF (DF was gone on a sleepover at a friend's house). 7RP 32, 52. She ran to a neighbor's house and called 911. 6RP 10-12, 15; 7RP 52. Police arrived and found the defendant right where SF described, passed out, naked from the waist down, on the bed. 6RP 32-34. His blood-spattered shoes were collected by officers--the sole pattern matching the imprinted bruises on SF's body and head. 6RP 35-37. The defendant's sawed-off shotgun was found on the seat of his Cadillac. 6RP 42-44; 7RP 61.

About a week later, family members of the defendant helped him contact SF from the jail by making three-way calls. 7RP 63. In recorded jail phone calls, the defendant professed his love for SF and told her how much he missed her. 7RP 64-65. He claimed he did not remember what happened that night. 7RP 66. He asked SF variously to drop the charges, not cooperate with the prosecutor, and to not show up for trial. 7RP 67. The defendant placed hundreds of phone calls to SF, despite the fact that a

no-contact order had been put in place. 7RP 69. SF admitted at trial that she still loved the defendant, that she had visited him in jail, put money on his books and had lied about the number of times the defendant called her, earlier telling defense counsel that it was only a few calls. 7RP 72-73.

A CD of portions of a few of the calls was admitted into evidence and played for the jury. 7RP 106-07; Exhibit 26 (the CD) and Exhibit 25 (a transcript of the conversation). The defendant's DNA was not found in a rape kit done on SF. 8RP 34-35. Forensic scientist Megan Inslee said this was not surprising. 8RP 36.

In a recorded statement made to detectives after his arrest, the defendant admitted to being intoxicated that night, that SF told him she had "cheated" on him, that he slapped her, but he claimed that he did not remember anything else. 8RP 58-60.

The defendant did not testify at trial. Additional facts are included in the sections they pertain.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY RULED THAT THE DEFENDANT'S CUSTODIAL STATEMENTS WERE ADMISSIBLE AT TRIAL.**

The defendant contends that the trial court erred in ruling that his custodial statements were admissible at trial. Specifically, while the defendant agreed to be interviewed, and he does not dispute that he made a knowing and voluntary waiver of his Miranda rights, he claims that during the course of being interviewed, he made an unequivocal request to consult with an attorney before any further questioning. This claim is not supported by the record and must be rejected.

**a. The CrR 3.5 Hearing.**

Prior to trial, the court held a CrR 3.5 hearing. CrR 3.5 governs generally the admissibility of statements of the accused. State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). The pertinent facts adduced from the hearing are as follows:

At approximately 9:00 a.m. on August 1, 2009, officers were dispatched to a domestic violence assault at the Bayview Townhomes in Kent. 2RP 54-55; 3RP 14. Upon making entry into the home, officers found the defendant passed out in the bedroom.

2RP 56-57; 3RP 19. He was placed under arrest without incident, allowed to put on his clothes, and escorted from the house to a patrol car. 2RP 56-57, 62; 3RP 19-20. The defendant was not asked any questions, did not make any statements, and did not invoke his Miranda rights. 2RP 58-59, 70; 3RP 21. He was then transported to the Kent jail. 2RP 69.

Two days later, at approximately 11:00 a.m. on August 3, 2009, Detective Derrick Focht and Detective Rob Jones, contacted the defendant at the jail. 2RP 79; 3RP 29. Detective Jones was investigating an unrelated crime, a burglary, wherein the defendant was a suspect. 2RP 79; 3RP 29. Detective Focht was assigned the domestic violence incident. Id. It was determined that Detective Jones would take the lead in the interview. 2RP 80; 3RP 31.

Jail staff brought the defendant to the booking area where the detectives introduced themselves and said they would like to talk with him. 2RP 81-82; 3RP 31. The defendant agreed. 2RP 82; 3RP 31. The three then went to an interview room and sat down. 2RP 83. Detective Jones turned on a tape recorder and proceeded to go through the defendant's Miranda rights with him. 2RP 83; 3RP 33-34; Pretrial Exhibit 1 (a transcript of the recorded

interview--3RP 36); Pretrial Exhibit 2 (the CD of the interview--3RP 53). The defendant waived his right to remain silent and his right to an attorney. 3RP 34, 40; Pretrial Exhibit 1.

Both detectives testified that they did not consider any statement made during the entire course of the interview as a request for an attorney, although reference to an attorney was made during the course of the interview. 2RP 88, 90; 3RP 40-41, 43. Reference to an attorney was made when the detectives asked the defendant whether or not he would be willing to take a polygraph examination regarding the burglary crime for which he was a suspect. 2RP 92-93; 3RP 40-42. It is this exchange that is the relevant portion of the interview pertaining to the defendant's argument on appeal.

Detective Jones: You know what a polygraph is?

The Defendant: Huh?

Detective Jones: Do you know what a polygraph is?

The Defendant: Yeah somethin' that you guys put in your (inaudible) fuckin'.

Detective Jones: Yeah lie detector test.

The Defendant: Yeah.

Detective Jones: Have you ever taken one before?

The Defendant: No.

Detective Jones: Have you ever taken one in your life?

The Defendant: No.

Detective Jones: Never have?

The Defendant: No.

Detective Jones: Would you take one for this case?

The Defendant: When?

Detective Jones: I don't know, if I could set it up?

The Defendant: That's (inaudible) man we can do it whenever I don't give a fuck.

Detective Jones: Okay ah it's a question, it's voluntary okay it's a tool that I can use to see if you're involved in this case or you're blowin' smoke up my ass.

The Defendant: Man we can do it I don't give a damn.

Detective Jones: Hm?

The Defendant: I don't give a damn I just know that I was in the casino.

Detective Jones: Okay that's what you're sayin' but I don't know that.

The Defendant: I know.

Detective Jones: And that's one thi, that's a tool that I can use to see if you're bein' truthful that you were casino or you're at this house beatin' somebody's ass.

.....

Detective Jones: Okay. Simple question, are you willin' to do a poly?

The Defendant: Do I have to do it though?

Detective Jones: Absolutely not. It is voluntary. It would be up to you if you wanted to do it or not.

The Defendant: Man I don't see why I gotta do it though. That thing is a machine man.

Detective Jones: It's an instrument absolutely. Is it accurate? Absolutely. If you have a polygraph examiner that knows what he's doin'.

The Defendant: Um hmm.

Detective Jones: You run the right tests they're valid and they're reliable and absolutely they are they are accurate.

The Defendant: But they're a machine.

Detective Jones: If you were involved.

The Defendant: The why the get a machine gonna tell you wh, whatever the the (inaudible).

Detective Jones: How how can an instrument do that a machine do that?

The Defendant: See it's not like a human bein' though.

Detective Jones: It's not but you know what.

The Defendant: It's just a um ah computer mean it's.

Detective Jones: Well it kinda is but the deal is that it it deals with your (inaudible) nervous system okay it

deals with with an um physiological changes in your body.

The Defendant: Um hmm.

Detective Jones: Alright that can tell me if you're bein' truthful or not alright it is very very accurate. And if you decide you wanna take that I will set that up and make sure it happens but again it's voluntary. I don't wanna waste my time if you're saying' no I don't wanna do it.

The Defendant: Um hmm (pause) shit man I gotta talk to my lawyer someone.

Detective Jones: Okay.

The Defendant: (inaudible) man if it's cool which you then take it then.

Detective Jones: Okay.

The Defendant: It it's not, fuck it.

Detective Jones: Okay fair enough. This is what I'll do I'll leave my number in your property.

The Defendant: Um hmm.

Detective Jones: And if you decide that you wanna take that all you gotta do is call me or have your attorney call me and I'll set it up alright?

Pretrial Exhibit 1, at pp 16-17.

At the conclusion of the hearing, the trial court ruled that the defendant's reference to an attorney was not a request to invoke his Miranda rights during the interview. Rather, the court ruled that

the defendant was simply expressing his desire to speak with an attorney before deciding whether or not to agree to take a polygraph examination at a later date. The statement was not an indication that the defendant wanted to speak with an attorney before answering any more questions. CP 87-90. The court noted that the defendant made a statement at the beginning and the end of the interview wherein he indicated that he was freely willing to talk to the police. 4RP 6.

**b. The Trial Court's Ruling Was Correct.**

Under the First and Fourteenth Amendments to the United States Constitution, the police must inform a suspect of his right to remain silent and to the assistance of an attorney before subjecting him to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If a suspect "clearly" asserts his right to counsel, the police may not subject him to further questioning until he has had an opportunity to confer with counsel or the suspect himself initiates further communication. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Once a suspect has made a knowing and voluntary waiver of his Miranda rights, an officer may continue questioning unless and until the suspect unequivocally requests an attorney or asserts his right to remain silent. Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008) (overruling State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982)). In other words, the invocation of the right to an attorney must be clear and unequivocal in order to be effectual. State v. Walker, 129 Wn. App. 258, 276, 118 P.3d 935 (2005), rev. denied, 157 Wn.2d 1014 (2006). When the request is not clear and unequivocal, police are not required to ask clarifying questions and may continue interviewing a suspect. Id.

This Court reviews a trial court's decision after a CrR 3.5 hearing to determine if substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Conclusions of law are reviewed *de novo*. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

The defendant claims his reference to an attorney was an unequivocal request that he be allowed to have an attorney present during the continuation of the interview or that he be allowed to speak with an attorney before he would answer any further questions. He asserts that position is supported by the lack of any equivocal language in his statement. He also asserts that it is irrelevant what his purpose was in requesting an attorney. But what the defendant ignores is the temporal conditional nature of his "request." Taken in context, it is very clear that what the defendant expressed is that before deciding whether or not to take a polygraph, he wanted to speak with an attorney and that he would or could do so at a later time before making that decision. There is nothing about his statement that suggests he did not want to continue doing exactly what he was doing--and continued to do, answer the questions put to him by the detectives. The defendant fails to show that the trial court's ruling was in error.

**c. Any Error Was Harmless.**

An erroneous admission of custodial statements is subject to constitutional harmless error review. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

Constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). Such is the case here.

Any error in the admission of that portion of the defendant's statement made after his reference to an attorney was harmless. First, the defendant spoke very little about the alleged rape of SF. He did not confess to raping SF, or even having had sexual contact with her. Second, what little the defendant said about the incident with SF--post-reference to an attorney, was the exact same thing he said about the incident pre-reference to an attorney. Specifically, what the defendant said after he made reference to an attorney was that he was drunk, SF told him she had cheated on him, that he slapped her, and that he did not remember anything after that until he was arrested. This is the exact same thing the defendant said prior to any reference to an attorney. Third, in recorded jail phone calls, the defendant said the exact same thing, that he did not remember what happened that night. 7RP 66. And fourth, defense counsel admitted to the court during trial that the defense theory was "basically almost conceding that an assault took place, but that there was absolutely no rape." 8RP 41. Thus,

even if the defendant's reference to an attorney can be deemed an unequivocal request for an attorney, the error in the trial court finding otherwise is harmless because the defendant made the same statements before he made any reference to an attorney, during jail phone calls, and he did not confess to the crime.

**2. THE POST-TRIAL SEALING OF JURY QUESTIONNAIRES IS NOT AN ERROR THAT ALLOWS THE DEFENDANT TO OBTAIN A NEW TRIAL.**

The defendant contends that his and the public's right to an open trial were violated when the trial court sealed jury questionnaires without first conducting a Bone-Club<sup>3</sup> analysis. He asserts that this error is "structural" and therefore prejudice is presumed for which reversal and remand for a new trial is warranted. This claim is without merit. The jury questionnaires were sealed *well after* the defendant's trial was complete. This issue is governed by State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011) and State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009).

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<sup>3</sup> Referring to State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

A criminal defendant has a right to a public trial under both the federal and state constitutions. U.S. Const. amend VI;<sup>4</sup> Const. art. I, § 22.<sup>5</sup> Article I, section 10 of our constitution requires that “[j]ustice in all cases shall be administered openly. . . .” In addition to court proceedings, article I, section 10 ensures public access to court records. State v. Waldon, 148 Wn. App. 952, 957, 202 P.3d 325, rev. denied, 166 Wn.2d 1026 (2009). Jury questionnaires are “court records.” Coleman, 151 Wn. App. at 621-23.

The Washington State Supreme Court has held that generally, when a party requests a courtroom closure, the trial court must consider five factors (hereinafter the “Bone-Club” factors) on the record and enter findings justifying its closure order before closing the courtroom during trial.<sup>6</sup> State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006); see also Waldon, 148 Wn. App.

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<sup>4</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”

<sup>5</sup> “In criminal prosecutions the accused shall have the right ... to have a speedy public trial.”

<sup>6</sup> These factors are as follows: 1) there must be a compelling interest justifying the closure and, if the interest is a reason other than the defendant’s right to a fair trial, there must be a serious and imminent threat to the interest in question; 2) anyone present when the closure motion is made must be given an opportunity to object; 3) the method of closure must be the least restrictive means available for protecting the threatened interest; 4) the court must weigh the competing interests of the proponent of closure and the public; and 5) the closure order must be no broader in application or duration than is necessary. Bone-Club, 128 Wn.2d at 258-59.

at 967 (holding that an order sealing court records requires a Bone-Club analysis); Coleman, at 623 (same vis-à-vis jury questionnaires). To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. In re Orange, 152 Wn.2d 795, 806, 100 P.3d 291 (2004) (citing Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The right to a public trial is implicated only when the court orders a courtroom closed to the public. State v. Price, 154 Wn. App. 480, 483, 228 P.3d 1276 (2009).

Generally, the failure to conduct a Bone-Club analysis on the record results in reversal for a new trial. State v. Brightman, 155 Wn.2d 514, 518, 122 P.3d 150 (2005); but see State v. Momah, 167 Wn.2d 140, 150, 217 P.3d 321 (2009) (finding that not all courtroom closures trigger a conclusive presumption of prejudice warranting automatic reversal for a new trial; holding that “[i]n each case the remedy must be appropriate to the violation”) (quoting Waller, 467 U.S. at 50); Coleman, 151 Wn. App. at 623-24 (finding that the trial court's failure to conduct a Bone-Club analysis before sealing jury questionnaires results in remand for reconsideration of

the closing order under Bone-Club and Waldon); accord, Tarhan, supra.

**a. The Jury Questionnaires.**

The defendant's trial began on May 3, 2010. 1RP 1. Prior to selecting a jury, the court granted the defendant's motion to use a confidential jury questionnaire in his case. 2RP 107-08; 5RP 3; CP 91-116. The jury questionnaire told the jurors that the answers to the questionnaire would be confidential. CP 331-432. Jury selection began on June 7 and was completed on June 8, 2010. CP \_\_\_\_, Sub # 49A. The jury returned its verdicts on June 16, 2010. CP 164, 166-69. On June 30, 2010, 14 days after the defendant's trial was complete, the court filed the jury questionnaires with the clerk's office under seal. CP 330. Prior to this date, there is nothing in the record indicating that the courtroom was ever closed to the public or that any and all documents or court records used in court were not open to the public. The defendant did not move to unseal the jury questionnaires, nor has any member of the public done so.

**b. The Defendant Cannot Assert The Public's Open Trial Rights.**

As a preliminary matter, the defendant cannot assert the public's right to an open trial; he lacks standing to make such a claim. See State v. Strobe, 167 Wn.2d 222, 236, 217 P.3d 310 (2009) (Fairhurst, J., concurring):

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.

“Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” Davidson v. Hensen, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). Moreover, even the plurality opinion conceded in its response to the concurrence that it was not addressing Strobe's public trial rights:

The concurring justice asserts that any discussion of the public's right to open trials conflates the rights of the defendant and the public because a defendant should not be able to assert the rights of the public or press. Strobe has not asserted any rights belonging to the public or press concerning public trials.

Strode, 167 Wn.2d at 230 n.4 (plurality). See also State v. Wise, 148 Wn. App. 425, 442, 200 P.3d 266 (2009) (holding that the defendant lacked standing to raise public's open trial rights), rev. granted, 170 Wn.2d 1009 (2010); but see In re Detention of Ticeson, 159 Wn. App. 374, 246 P.3d 550 (2011).

**c. The Defendant Invited The Error That He Claims Occurred.**

The defendant next asserts that *his* right to a public trial was violated when the trial court sealed the jury questionnaire without engaging in a Bone-Club analysis. However, he invited the very error that he says occurred. See Momah, 167 Wn.2d at 153-54 (discussing the invited error doctrine vis-à-vis courtroom closures).

The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error rule recognizes that “[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

In Momah, because of heavy pre-trial publicity, and in an attempt to avoid contaminating the venire, Momah's counsel agreed to privately question potential jurors in chambers. Momah, at 145-46. In addition, "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefitted from it." Id. at 151. The trial court closed the courtroom "to safeguard Momah's right to a fair trial by an impartial jury, not to protect any other interests." Id. at 151-52.

Here, the defendant sought questioning of prospective jurors by a confidential questionnaire. CP 91-116. The jury questionnaire proposed by the defendant assured prospective jurors that their responses would be confidential. CP 331-432. The defendant did not ask the court to engage in a Bone-Club analysis. Thus, the defendant invited any error here.

**d. The Defendant May Not Claim That Structural Error Occurred.**

The majority in Momah concluded that the courtroom closure that occurred should result in relief short of reversal. Momah, 167 Wn.2d at 154-56. The Court stated, "courts grant automatic

reversal and remand for a new trial only when errors are structural in nature.” Id. at 155. A structural error “renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. at 155-56. The Court recognized that not only would reversal be disproportionate to the violation, it would result in a windfall for Momah, despite no showing that Momah's case was actually rendered unfair by the closure. Id. at 150.

Likewise, this Court has recognized that sealing jury questionnaires without engaging in a Bone-Club analysis on the record is not structural error. Coleman, 151 Wn. App. at 623-24; Tarhan, 159 Wn. App. at 829-30. Here, as in Coleman and Tarhan, the questionnaires were used during *voir dire*, which proceeded in open court. Further, in contrast to Coleman and Tarhan, wherein the questionnaires were sealed while trial was still in progress, here, the questionnaires were not sealed until two weeks after the defendant's trial was complete.

Like the defendant in Tarhan, the defendant here posits that the questionnaires were not available to the public during the course of trial. He spends a great deal of time discussing local court rules dealing with obtaining documents from the court clerk's office. This lengthy argument is of no moment. The questionnaires

were not filed with the clerk's office until two weeks after the defendant's trial. Beyond mere speculation, there is absolutely nothing in the record that demonstrates the questionnaires were not available to the public in the courtroom. As in Momah, Coleman, and Tarhan, the defendant fails to show any structural error justifying the reversal of his conviction.

**3. THE DEFENDANT'S CONVICTIONS FOR RAPE IN THE SECOND DEGREE AND FELONY HARASSMENT VIOLATE DOUBLE JEOPARDY.**

The State concedes that the defendant's convictions for rape in the second degree (count II) and felony harassment (count III) violate double jeopardy. This will require remand for vacation of the felony harassment conviction. Because the defendant's standard range for all other offenses remains the same, his offender score still in excess of nine, and the basis for the exceptional sentence unaffected, vacation of the felony harassment conviction will not require that the defendant be resentenced.

In State v. Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature. See State v. Calle, 125 Wn.2d 769, 776, 888 P.2d

155 (1995). The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, 125 Wn.2d at 776. Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or "Blockburger" test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately.<sup>7</sup> Calle, at 778-80.

Neither the rape statute (RCW 9A.44.050), nor the felony harassment statute (RCW 9A.46.020) expressly allows or disallows multiple punishments for a single act. Because the statutes do not supply this Court with an answer, the Court must turn to the "same evidence" test.

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<sup>7</sup> The State's concession is based on application of this test. The defendant appears to apply some sort of "same conduct" test previously rejected by the Supreme Court. See United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995).

The "same evidence" or "Blockburger"<sup>8</sup> test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, the defendant's convictions are the same "in law" and "in fact." The convictions are the same "in fact" as the facts show that the defendant physically assaulted and threatened to kill SF and her children while he raped her.

As charged here, to convict the defendant of felony harassment, the State was required to prove that the defendant knowingly threatened to kill SF and her children and that his words or conduct placed SF in reasonable fear that the threat would be carried out. CP 118, 154; RCW 9A.46.020(1), (2). As charged here, to convict the defendant for rape in the second degree, the

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<sup>8</sup> Referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

State was required to prove that by forcible compulsion the defendant engaged in sexual intercourse with SF. CP 118, 148; RCW 9A.44.050(1)(a). In pertinent part, "forcible compulsion" means "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person." CP 142; RCW 9A.44.010(6).

Here, as charged and proven, while rape in the second degree contains an element not contained in the felony harassment charge (sexual intercourse), felony harassment does not appear to have an element that is not contained within the meaning of forcible compulsion, an element of rape in the second degree. Thus, the convictions seem to meet the same "in law" prong of the same evidence test. Thus, this Court must find that the defendant's convictions violate double jeopardy principles unless "there is a clear indication of contrary legislative intent." Calle, at 780. The State can point to no such contrary legislative intent.

While there does not appear to be any published case involving these two crimes directly on point, there is an unpublished case, State v. Kone, 2010 WL 4157272 (Wn. App. Div. 3, 2010), rev. denied, 171 Wn.2d 1006 (2011). The State can find no fault with this decision. See also State v. Eaton, 82 Wn. App. 723,

729-31, 919 P.2d 116 (1996) (court correctly holds that merger does not apply--felony harassment does not elevate rape in the second degree to rape in the first degree).

The double jeopardy violation requires the vacation of the felony harassment conviction. Because the vacation of this conviction does not change the standard range for any of the defendant's other offenses and does not affect the basis for his exceptional sentence, resentencing is not required. See CP 460-79 (scoring forms); CP 304, 316-19.

**4. THE DEFENDANT'S "SAME CRIMINAL CONDUCT" INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS MOOT.**

The defendant claims that his trial counsel was ineffective for failing to argue that his convictions for rape in the second degree (count II) and felony harassment (count III) constituted the "same criminal conduct" for scoring purposes. Due to the State's concession that these two convictions violate double jeopardy, this issue is moot.

**5. STATE V. BASHAW DOES NOT REQUIRE REVERSAL OF THE DEFENDANT'S EXCEPTIONAL SENTENCE.**

The defendant contends that his exceptional sentence must be reversed because of a claimed Bashaw jury instruction error. The defendant bases his claim on the assertion that the jurors were improperly instructed under Bashaw, supra, that they had to be unanimous either to find, or to reject, the domestic violence aggravator. This claim should be rejected for four reasons. First, the defendant invited any error by expressly stipulating to the instructions proposed. Second, Bashaw does not apply to aggravating factors because, unlike the school bus stop enhancement at issue in Bashaw, the relevant statute governing exceptional sentence procedures expressly requires jury unanimity for a "no" finding.<sup>9</sup> Third, any possible error was harmless. Fourth, the defendant's exceptional sentence is supported independently by an aggravating factor not subject to a Bashaw challenge.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re Dependency of K.R., 128 Wn.2d 129,

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<sup>9</sup> The State is aware that this Court recently rejected this argument in State v. Ryan, \_\_\_ Wn. App. \_\_\_ (No. 64726-I, filed April 4, 2011). The State argues the issue here in order to preserve it for further review.

147, 904 P.2d 1132 (1995); Henderson, 114 Wn.2d at 870-71.

Under the invited error doctrine, a claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars a claim even if that claim impacts a constitutional right. Patu, 147 Wn.2d at 720-21.

In this case, the court gave the standard WPIC concluding instruction that states in pertinent part that "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." CP 163; WPIC 155.00. The defendant expressly stipulated to the WPIC instructions proposed and given. CP 122. Accordingly, the invited error doctrine bars consideration of this claim on appeal.

But even considering this claim on the merits, the defendant cannot show that the instruction was erroneous because the relevant statute requires jury unanimity for any kind of verdict, whether "yes" or "no." See RCW 9.94A.537(3). Bashaw involved a school bus route enhancement, and the relevant statute is silent as to whether the jury must be unanimous in order to answer "no."

See RCW 69.50.435. Accordingly, while the Bashaw court made a policy decision that a non-unanimous jury can reject a drug crime sentencing enhancement, that decision runs afoul of express statutory language in the context of aggravating factors.

Furthermore, the Bashaw court cited judicial economy and finality as policies furthered by its holding in that case. Bashaw, 169 Wn.2d at 147. But in the case of aggravating circumstances, the legislature has already determined that the imposition of an appropriate exceptional sentence outweighs any judicial economy concerns, as the statute expressly authorizes a new jury trial on remand on the aggravating circumstances alone if an exceptional sentence is reversed on appeal. RCW 9.94A.537(2). This is further proof that Bashaw does not apply to aggravating circumstances, as the policy underpinnings are completely at odds.

In addition, any possible error is harmless beyond a reasonable doubt.<sup>10</sup> In Bashaw, the court found that the instructional error was not harmless because the court could not discern "what result the jury would have reached had it been given

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<sup>10</sup> As noted in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011), the Bashaw court found that the issue presented was not of constitutional magnitude, yet the court applied the constitutional harmless error standard, i.e., whether the error was harmless beyond a reasonable doubt. Bashaw, at 147.

a correct instruction." Bashaw, at 147. Here, there was no dispute that SF's minor child was in the home when the alleged rape occurred. The defense theory was that no rape occurred. The jury rejected this theory, finding the defendant guilty of rape in the second degree. The jury then returned a special verdict answering "yes" that the crime was an aggravated domestic violence offense--that SF and the defendant were household members and that the rape was committed within the sight or sound of SF's child--a foregone conclusion once the jury determined that a rape occurred. CP 149, 171. Under the facts here, there is no reasonable probability that the jurors would have reached different results if they had been instructed that they need not be unanimous to answer "no" to the special verdicts.

Finally, the defendant's argument, even if he prevails, does not provide him with the relief he seeks--reversal of his exceptional sentence. The court imposed the exceptional sentence based on three separate statutory aggravating factors--one that requires a jury finding beyond a reasonable doubt, two that do not. See RCW 9.94A.535(2) and (3); CP 316-19.

One of the factors used as a basis for the exceptional sentence was the domestic violence aggravator discussed above.

CP 318; RCW 9.94A.535(3)(h)(i). The statute requires, and the jury found, this factor met beyond a reasonable doubt. CP 171.

The second factor relied upon to impose the exceptional sentence was found by the trial court, that the defendant's prior unscored misdemeanor criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of the Sentencing Reform Act as expressed in RCW 9.94A.010. CP 318; RCW 9.94A.535(2)(b). The State does not rely on this factor for its argument. See State v. Saltz, 137 Wn. App. 576, 582, 154 P.3d 282 (2007).

The third factor relied upon to impose the exceptional sentence, and found by the trial court as required by the statute, was that the defendant committed multiple current offenses and his high offender score results in some of the current offenses going unpunished. CP 318; RCW 9.94A.535(2)(c). This factor is not subject to the defendant's Bashaw challenge because it is properly found by the sentencing judge. Further, the court specifically held that "it would impose the same exceptional sentence based upon any one of the aggravating factors standing alone." CP 318. Thus, even were the defendant to prevail in his Bashaw challenge, he is not entitled to the relief he seeks, reversal of his exceptional

sentence. Remand is not required when an aggravating factor is overturned on appeal if the court is satisfied that the trial court would impose the same exceptional sentence. See State v. Hughes, 154 Wn.2d 118, 134, 110 P.3d 192 (2005); Saltz, 137 Wn. App. at 585. Here, the trial court's express finding indicates the same sentence would be imposed.

**6. THE JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR.**

As to count II, the defendant was charged with, and convicted as charged, with rape in the second degree. CP 118, 147, 166. However, on the first page of the Judgment and Sentence, when listing the jury's verdicts, it is mistakenly listed that count II was a conviction for rape of a child in the second degree. CP 303. This Court should remand for correction of this scrivener's error.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's convictions and sentence. The case should be remanded to correct the single scrivener's error in the judgment

and sentence and to vacate the defendant's felony harassment conviction.

DATED this 1 day of June, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. NYSTA, Cause No. 65774-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

6/1/11  
Date

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